Filed 7/29/20 P. v. Vanderheiden CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ALAN VANDERHEIDEN, Defendant and Appellant.	F077714 (Super. Ct. No. 1429740) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Linda A. McFadden, Judge.

Matthew A. Siroka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Jennifer M. Poe, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted Robert Alan Vanderheiden of first degree murder and felony domestic violence for shooting and killing his girlfriend. The jury also found true an enhancement allegation he committed the murder by intentionally discharging a firearm.

At sentencing, the court refused to strike the firearm enhancement. He was sentenced to serve 50 years to life in state prison.

The appeal presents two questions. First, were the jury instructions prejudicially erroneous? Second, did the court abuse its sentencing discretion because it was presumably unaware it could choose to impose a lesser but uncharged included firearm enhancement? For reasons that follow, we affirm.

BACKGROUND

Charges

The Stanislaus County District Attorney charged Vanderheiden with two crimes: murder (Pen. Code, § 187, subd. (a))[1] and felony domestic violence (§ 273.5, subd. (a)). The murder charge included an enhancement for personally and intentionally discharging a firearm causing great bodily injury. (§ 12022.53, subd. (d).)

Trial Evidence

The victim was killed by a single gunshot wound through the forehead. The evidence at trial primarily concerned whether Vanderheiden accidentally or intentionally shot the victim.

The prosecution focused its case on proving Vanderheiden controlled the relationship and would not let the victim leave him. To that end, the victim's family members testified to various statements Vanderheiden made in the months and hours before the shooting. For example, a few months before the shooting, the victim asked her sister about moving back in with her family and away from Vanderheiden. He found out, became upset, and was overheard saying, "The only way she's fucking leaving is if she gives me head first." The same day, he left a voicemail on the victim's aunt's phone stating, "I've come to find out … that you people are trying to pull … my … my … beautiful flower away from me … the one that I found … is the … missing piece to my

[1] All statutory references are to the Penal Code.

… my … incomplete person and it devastates me." The voicemail concluded, "I love your daughter with all my heart and she'll be in a good place … but she won't be contacting you anymore. I'm sorry." The voicemail was played for the jury.

On the day of the shooting, the victim's sisters were visiting her and Vanderheiden. In the evening, the victim departed Vanderheiden's residence with her sisters and headed for her aunt's house. When Vanderheiden noticed she was missing he became enraged. He called the victim, "screaming and yelling." He directly accused one sister of "trying to steal his whore." Eventually, the victim returned to Vanderheiden and was shot hours later.

Shortly after the shooting, Vanderheiden briefly conversed with a law enforcement officer; the conversation was neither detailed nor probing. Vanderheiden said he heard a gunshot and did not see the victim shoot herself. He never told the officer the victim committed suicide. The conversation terminated as Vanderheiden became overcome with emotion.

Vanderheiden testified at the trial. He denied making any derogatory statements about the victim. He acknowledged he was upset prior to the shooting because the victim left without explanation. After the victim came back home, they "argued for a little while." When things calmed down, he placed his firearm on a nearby table and they engaged in sexual activity.

Later, Vanderheiden noticed the victim "spinning" the firearm around her finger. Alarmed, he attempted to disarm her but the firearm discharged and struck her in the forehead.

Vanderheiden explained he drank alcohol that day but it did not impair his mobility or speech. Two law enforcement officers observed Vanderheiden immediately after the shooting and did not believe he was under the influence of alcohol.

Verdict and Sentence

Vanderheiden was convicted as charged. He was sentenced to serve 25 years to life for first degree murder with a consecutive 25 years to life for the firearm enhancement. Sentence for the domestic violence conviction was imposed and stayed.

DISCUSSION

Vanderheiden raises two issues on appeal. He first challenges the court's jury instructions as they related to voluntary intoxication and false or misleading statements made prior to trial. The People argue this claim is forfeited for lack of objection and otherwise harmless.

Vanderheiden also asks this court to remand his case for a new sentencing hearing pursuant to *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*). *Morrison* held trial courts retain discretion to impose lesser included firearm enhancements even when those enhancements are not pled. (*Id*. at pp. 222-223.) We conclude remand is unwarranted because the trial court here clearly indicated it would not exercise its discretion to impose a lesser sentence.

I. The Instructions Were Erroneous But Harmless

The instructions at issue are CALCRIM Nos. 625 and 362. As relevant, these instructions explained "[y]ou may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation. … You may not consider evidence of voluntary intoxication for any other purpose." (CALCRIM No. 625.) "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt." (CALCRIM No. 362.)

Vanderheiden claims these instructions "prevented the jury from considering the impact of his voluntary intoxication on his ability to accurately recall the details of the shooting." The People contend the argument is forfeited because there was no objection in the trial court and, if not, the error is harmless. We must address the claim on its merits to determine forfeiture. (§ 1259 ["appellate court may … review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; see *People v. Stringer* (2019) 41 Cal.App.5th 974, 981, fn. 2 [must appraise merits to determine if substantial rights affected]; *People v. Anderson* (2007) 152 Cal.App.4th 919, 927 [same].)

Vanderheiden "is correct to the extent he claims the court erred in giving these instructions together in this case. CALCRIM No. 362 allowed the jury to infer … consciousness of guilt if the jury found that [he] made false or misleading statements about the crime, knowing the statements were false or intending to mislead. CALCRIM No. [625], however, prohibited the jury from considering that those false or misleading statements were made without knowledge they were false or misleading because [he] was intoxicated at the time he made those statements. This is because CALCRIM No. [625] prohibited the jury from considering … voluntary intoxication for any purpose other than to decide whether he" acted with the requisite intent. (*People v. Wiidanen* (2011) 201 Cal.App.4th 526, 533 (*Wiidanen*).)

"This prohibition was error because a defendant's false or misleading statements made when he was intoxicated may not be probative of … veracity, if the jury believed the defendant was too intoxicated to know his statements were false or misleading." (*Wiidanen, supra,* 201 Cal.App.4th at p. 533.) Nonetheless, we conclude the error in this case is harmless. The record contained limited evidence of intoxication, and even less evidence of its effect.

No witness, including Vanderheiden, testified he was intoxicated or impaired at the time he made his pretrial statements. Vanderheiden himself denied that alcohol impaired his speech. He did not explain how much alcohol he consumed. And no chemical testing established his blood alcohol content.[2] On this record, it is not reasonably probable he would have received a more favorable outcome had the jury considered intoxication and its effect on his limited pretrial statements.

In reality, Vanderheiden's pretrial statements were neither false nor misleading. He claimed, in a seemingly frantic state, he heard a gunshot and did not see the victim shoot herself. Both claims are objectively consistent with his testimony describing a struggle in which he accidentally discharged the firearm. Correct instructions could not have impacted the jury because the false or misleading statement instructions were technically irrelevant. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130 [while "[i]t is error to give an instruction which … has no application to the facts of the case," juries properly detect factually inadequate instructions].)

The instructions were thus erroneous but harmless. Accordingly, we find the claim is forfeited, as Vanderheiden's substantial rights were not affected.

II. Remand Is Unnecessary

Vanderheiden argues this court should order a limited remand to provide the trial court the opportunity to impose a lesser firearm enhancement than that which was charged in the information. He cites *Morrison*, *supra*, 34 Cal.App.5th 217, as authority for his position. *People v. Tirado* (2019) 38 Cal.App.5th 637, 644, review granted

---

[2] Although J.W., Vanderheiden's brother-in-law, testified that Vanderheiden was drunk at the time of the incident, the pretrial statements at issue occurred approximately one hour later. Additionally, the two investigating officers concluded Vanderheiden was not intoxicated. Deputy Sheriff Mark Nuno testified that he did not smell alcohol on Vanderheiden and he did not appear to be under the influence. Sergeant Jon McQueary testified that the odor of alcohol was present, but that Vanderheiden did not appear to be intoxicated; McQueary did not take a blood sample from Vanderheiden for blood alcohol testing, although he did take a sample from the victim.

November 13, 2019, S257658, *People v. Garcia* (2020) 46 Cal.App.5th 786, 790-794, review granted June 10, 2020, S261772, and *People v. Yanez* (2020) 44 Cal.App.5th 452, 458-460, review granted April 22, 2020, S260819, are contrary to *Morrison*. We need not decide which case is correct because we find remand unnecessary in this case.

A. Additional Background

Vanderheiden urged the trial court to strike the section 12022.53, subdivision (d) firearm enhancement. The court sentenced Vanderheiden only after reading the written pleadings, considering the probation report, and listening to each counsel's argument.

The trial court believed the victim "was very vulnerable" and "didn't do anything that would warrant premeditated murder through the use of a firearm." The court ultimately concluded:

> "I don't see that the interest of justice in this case warrants striking the firearm enhancement, for murder that was committed with a firearm against a person with whom you held a great position of trust, but never did anything to warrant your premeditated killing of her. This is not a situation where – I can envision some situations where it may be wise to strike the enhancement; I just don't see that in the case here."

The court subsequently declined to strike the enhancement.

B. Analysis

" ' "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record "clearly indicate[s]" that the trial court would have reached the same conclusion "even if it had been aware that it had such discretion." ' " (*People v. Flores* (2020) 9 Cal.5th 371, 431-432.)

The record here clearly indicates the court would have reached the same conclusion even if it could impose a lesser yet uncharged included enhancement. The court expressed great concern for Vanderheiden's premeditated decision to take advantage of the victim's trust and callously shoot her in the head. The trial court could not envision any circumstance that would justify striking the enhancement. Remand for the court to again consider striking the enhancement would be an idle act.

DISPOSITION

The judgment is affirmed.

SNAUFFER, J.

WE CONCUR:

MEEHAN, Acting P.J.

DE SANTOS, J.